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NO. 75-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

NORFOLK AND WESTERN RAILWAY COMPANY, a corporation,

Petitioner,

v.

ROBERT ROCK, EZELL B. JOHNSON, RUSSELL C. WALKER, each individually and on behalf of all others similarly situated; **UNITED TRANSPORTATION UNION LOCAL NO. 974,** an unincorporated association; **UNITED TRANSPORTATION UNION LODGE NO. 550,** an unincorporated association; and **UNITED TRANSPORTATION UNION,** an unincorporated association,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ROBERT ROCK, EZELL B. JOHNSON, RUSSELL C. WALKER, each individually and on behalf of all others similarly situated; **UNITED TRANSPORTATION UNION LOCAL NO. 974,** an unincorporated association; **UNITED TRANSPORTATION UNION LODGE NO. 550,** an unincorporated association; and **UNITED TRANSPORTATION UNION,** an unincorporated association,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Norfolk and Western Railway Company petitions for a writ of certiorari to review the judgment of the Court of Appeals for the Fourth Circuit rendered in this case on September 22, 1975. A petition for a writ of certiorari seeking review of the same judgment has been filed with this Court (No. 75-973) by the United Transportation Union and the United Transportation Union Lodge No. 550, the unions that were co-defendants with the Norfolk and Western in the trial court. The instant petition, however, seeks review of issues other than the dovetailing merger of seniority rosters.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit and the opinion of the dissenting judge, reported at .... F.2d ...., are set forth in the Appendix to this Petition (A. 1).[1]

This case was also before the Court of Appeals on a prior occasion (473 F.2d 1344 (1973)). The Appendix sets forth that opinion (A. 36), the initial opinion (A. 47) and the implementing decree (A. 62) of the district court, and the opinion of the district court on remand (A. 27).

JURISDICTION

The judgment of the Court of Appeals was entered on September 22, 1975. Re-hearing was denied on December 1, 1975. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The jurisdiction of the District Court was predicated on Title VII of the Civil Rights Act, 42 U.S.C. § 2000e *et seq.*

QUESTIONS PRESENTED

(1) Whether the ruling of the majority of the Court of Appeals that the employer cannot escape liability, and that the co-defendant unions cannot be held solely and directly liable for backpay arising from the unions' refusal to merge separate seniority rosters, fails to accommodate the deterrent objective of Title VII of the Civil Rights Act with the duty of fair representation imposed upon unions under the Railway Labor Act.

(2) Whether the ruling of the court below conflicts with decisions of the Court of Appeals for the Fifth Circuit

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[1] "A." refers to the Appendix to this petition; "R." refers to the Joint Appendix filed in the first appeal to the Court of Appeals; "R. Supp." refers to the Supplemental Appendix filed in the second appeal.

establishing principles for dividing, allocating or assigning backpay responsibility with respect to employers and unions as co-defendants on the basis of their individual actions and relative good faith or fault.

(3) Whether the ruling of the court below, by ignoring duties imposed by the Railway Labor Act, conflicts with even the narrowest application of principles followed in decisions by courts of appeals in other circuits which have exonerated employers who, by honoring state "female protective" statutes, violated the Civil Rights Act.

(4) Whether the majority of the court below, in assigning backpay liability to the employer, erred as a matter of law by failing to consider that the United Transportation Union was the exclusive statutory bargaining agent for the plaintiffs and that, as against the company, both the UTU and its member-plaintiffs are bound by the UTU's undisputed knowledge of the employer's unconditional, written 1968 offer to dovetail seniority rosters.

(5) Whether the backpay provision of Title VII, which requires factual inquiries as to the responsibility of each respective co-defendant for the continuation of the separate seniority rosters, was misinterpreted by the majority below as requiring that the entire liability be imposed directly on the company as "a financially responsible party" (A. 8), thus applying what the dissent characterized as "Robin Hood justice" (A. 24) while ignoring the financial ability of the union co-defendants to satisfy the backpay liability.

(6) Whether the court below improperly substituted its opinion for specific, substantiated findings of fact by the trial court, contrary to this Court's pronouncement that in Title VII cases courts of appeals must recognize that the trial court has the keener appreciation of the facts, circumstances and combination of factors, and improperly overruled the trial court's exclusion of belated references to wage guarantees under a 1964 merger agreement, approved by the Interstate Commerce Commission, which was not part of the record.

STATUTES INVOLVED

The statutes involved are Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) ("Title VII") and the Railway Labor Act (45 U.S.C. § 152). The relevant sections of Title VII provide that:

> "(a) It shall be an unlawful employment practice for an employer—
>
> "(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." (42 U.S.C. § 2000e-2(a)(2))
>
> • • •
>
> "(c) It shall be an unlawful employment practice for a labor organization—
>
> "(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or
>
> "(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section." (42 U.S.C. § 2000e-2(c)(2)(3))
>
> • • •
>
> "If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such

affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice), or any other equitable relief as the court deems appropriate." (42 U.S.C. § 2000e-5(g))

The Railway Labor Act (45 U.S.C. § 152) provides that:

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

STATEMENT OF THE CASE

Two of the principal controversies in this case have concerned the merger of separate seniority rosters and possible backpay liability arising from the continued existence of those separate rosters. Before the commencement of this litigation, the Norfolk and Western Railway Company ("N & W"), in a letter of October 31, 1968 (A. 19-20; R. 926a), made an unconditional offer to eliminate and dovetail the separate rosters. The N & W did not in the court below, and does not, contest the dovetailing merger. The N & W does, however, seek review of those rulings of the majority

of the court below that pertain to the co-defendants' respective liabilities for backpay.

The background of the case was succinctly described by the district court in its initial opinion (A. 48-49):

> "The Norfolk and Western Railroad terminal at Norfolk is in fact two separate yards. The CT Yard is the commercial and classification yard into which is received all incoming Norfolk and Western freight from sea or by rail or truck, of every description, including coal. There is also the Barney Yard facility which is exclusively a terminal for receipt of coal by rail for export to the world over.
>
> "As in the case of railroad industry nationwide, Norfolk and Western employment at Norfolk is down from peak years. The Barney Yard operation has approximately 145 operating employees, nearly all black, divided into a three step employment progression of brakemen, foremen, and car retarder operators. The CT Yard has approximately 350 operating employees, mostly white, in a three step employment system of brakemen, conductors, and car retarder operators.
>
> "The pay is identical in each step in each yard and no problem of disparate wages is presented in this case. A single international union, United Transportation Union, has jurisdiction throughout both yards. Workers of both yards are governed by a single collective bargaining agreement negotiated between the UTU and N & W."

Over the years new employees, though relatively few in number, were hired largely by referrals from the employees themselves (word-of-mouth recruiting). Although the terminal's racial composition fairly mirrored the geographic region, each yard had a distinct racial identity.

Long before the Civil Rights Act of 1964, rates of pay were identical for all job classifications in both yards. For

some years before and in each year after 1965, many black Barney Yard employees earned more than their white CT Yard counterparts with substantially identical dates of hire.[2] Bidding for jobs and promotions is controlled by date of hire within each yard. Absent separate rosters, black Barney Yard and white CT Yard employees would have competed for jobs and promotions at both yards.

Although the United Transportation Union ("UTU") was the exclusive bargaining agent for both yards, there were two separate locals or lodges. UTU Local No. 974 was comprised of Barney Yard employees. UTU Lodge No. 550 members were from the CT Yard. The officers and individual members of the separate locals had provincial, vested interests in maintaining the separate locals and opposing dovetailing of the rosters. The members of the predominantly white lodge did not wish to merge; the members of the predominantly black lodge were of divided opinion,[3] presumably because a substantial number of them actually had higher annual earnings than their white counterparts. In addition, having separate lodges and rosters permitted each lodge to have its own grievance procedures, officers, and representatives to the UTU conventions (A. 52).

The subject of possible integration of the two seniority rosters was first raised in August of 1967 (R. 928a). At meetings in 1967 the UTU representative insisted that in-

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[2] See data at A. 17-18, fn. 1 and R. Supp. 442-455. In every year since 1966, not less than about 15% and up to about 30% of the black Barney Yard employees earned more than their white CT Yard counterparts with equivalent seniority.

[3] In April of 1968 officials of the black local conducted a referendum to determine the opinions of its members with respect to the merging of seniority rosters. Most of the ballots were not returned but the results indicated some opposition to any form of merger and the number of those responding who either opposed any merger or did not favor dovetailing was almost equal to the number who indicated that dovetailing would be acceptable (R. 241a-243a).

tegration of rosters was "an internal matter" for the UTU (R. 940a). Robert Rock, one of the class representatives, was present and concurred in the UTU statement (R. 940a). The N & W was also told that it would be contacted if and when any integration of rosters was acceptable (R. 940a). The UTU's statements in the 1967 meetings placed in abeyance any form of roster merger.

On October 31, 1968, the N & W made a written, unconditional offer to the UTU to dovetail the separate rosters (A. 19-20; R. 926a). The letter proposed dovetailing and urged meeting "to effect this ['dovetailing of seniority rosters'] as soon as possible" (A. 20; R. 926a).

The UTU representative responded to the N & W's unconditional offer by informing the company that the two locals "could not reach an agreement" to dovetail, but that the UTU was willing to discuss the possibility that an agreement to top and bottom could be reached (R. 580a). Thus, the UTU rejected dovetailing and would discuss only topping and bottoming. "Topping and bottoming" would have placed the employees in each yard at the bottom of the other yard's seniority roster. Unlike "dovetailing," which combines the employees of both yards in one roster based on seniority dates, topping and bottoming would have neither basically changed the status quo for existing employees nor fundamentally conflicted with provincial union interests in separate rosters.

In June of 1969 this action was commenced under Title VII by Robert Rock, who was chairman of the predominantly black local, and the other named plaintiffs on behalf of themselves and that local ("plaintiffs"). The co-defendants named in the suit were the employer, N & W; the UTU;[4] and the predominantly white local.

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[4] At that time the international union was the Brotherhood of Railroad Trainmen, which was succeeded by the UTU. For simplicity, the international union is referred to herein as being the UTU.

After a trial involving approximately thirty-four witnesses and sixty-six exhibits, the district court on January 20, 1972, concluded that the maintenance of separate locals had discriminatory effects (A. 59). The court found that the N & W was not responsible for the maintenance of those separate locals (A. 59), but ordered it to cease hiring through employee referrals (A. 60). The separate local unions were ordered to, and did, merge. The separate seniority rosters were to be merged by topping and bottoming. No backpay was awarded.

On the first appeal, the Court of Appeals for the Fourth Circuit, on February 13, 1973, ordered a dovetailing of rosters. The court remanded with instructions that the district court consider whether a backpay award would be appropriate in light of its finding that the dovetailing remedy was necessary. The union co-defendants sought and were denied certiorari on the issue of the judicially mandated dovetailing (412 U.S. 993).

On remand, the method for dovetailing the conductor rosters was litigated between the plaintiffs and the union defendants. On May 17, 1974, the district court rendered an opinion as to the method of dovetailing certain job classifications and denied backpay (A. 27). The court based its denial of backpay on a combination of factors including the following specific findings:

> "The Norfolk and Western, in an offer which this court has already found to be bona fide, proposed in 1968, that the rosters of the two yards be dovetailed. This was communicated to the Unions. The proposition was turned down by the Unions. It is hard for this court to believe, and frankly, it doubts, that such an offer could be known to the Unions and not known to the nominal plaintiffs in this suit, most of whom were local union officials. In 1968, they, as rank and file members, simply did not want to voluntarily chance a loss of seniority by any dovetailing of rosters, and they ought not to be allowed back pay now for something they opposed then." (A. 32-33)

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A second appeal ensued. On September 22, 1975, the majority of the Court of Appeals held that the employer, as a matter of law, could not escape direct liability for the backpay, while the co-defendant unions, also as a matter of law, could not be held similarly liable. The majority said that:

> "We do not think that N & W can escape liability to plaintiffs for backpay. As we have said, irrespective of any good faith effort on the part of N & W to obviate the discriminatory effect of separate seniority lists in 1968, the fact is that the discrimination was not obviated; under *Albemarle Paper Co.*, N & W's good faith efforts cannot insulate it from plaintiffs' claims." (A. 7)

Silent as to the existence of any duty or economic incentive for a union to obviate discrimination voluntarily, the majority concluded that:

> "any judgment should be against N & W and the unions jointly and severally, or against N & W solely, with a right to partial indemnity from the unions so as to insure that there be an economic incentive for an employer to obviate discrimination voluntarily . . . ." (A. 8)

Thus the Court of Appeals in effect mandated the trial court to find the employer directly liable[5] for all backpay

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[5] Although the court suggested that a judgment could be entered jointly and severally against the employer and the defendant unions, as a practical matter no union member will seek to collect a judgment from his international union or his presently merged local union when he can hold the employer fully liable. Moreover, the court stated that any partial indemnity from the unions is to be predicated upon a finding that they "combined with N & W to deprive black employees of income opportunities" (A. 9). The district court, however, had already found that the union refused to "combine" with the N & W to eliminate separate seniority rosters.

(Footnote continued on next page)

with the possibility of a partial indemnity from the unions. The corollary—that either or both of the co-defendant unions be held directly and solely liable for all or a separable portion of the liabilities, with or without a partial indemnity from the employer—was ignored.

The Court of Appeals also reversed the trial court's ruling that it would not consider references at closing argument to the wage guarantees of the 1964 Nickel Plate merger agreement, approved by the Interstate Commerce Commission, which was not in the record (A. 12-14, 17).

The dissenting judge emphasized that the majority's discussion of backpay liability should have been broken down to distinguish "the period prior to the October 31, 1968 offer to dovetail" from the subsequent years (A. 17). The dissent stated that the "across the board backpay award against the railroad" was "unsupported by the record in fact," "contrary to recognized legal principles and . . . a reading of *Albemarle Paper Company* unsupported by that opinion" (A. 19).

REASONS FOR GRANTING THE WRIT

This Court has ruled that "courts of appeals must maintain a consistent and principled application of the backpay provision, consonant with the twin statutory objectives . . . " of Title VII (*Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975)). One of those "twin statutory objec-

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(Footnote continued from previous page)

Robert Rock and the other plaintiffs have emphasized to this Court in No. 75-973 that: "Neither court below has yet ruled on the issue of the Unions' liability" (Br. in Opposition, p. 4). That statement reflects plaintiffs' relative lack of concern with the matter of which defendant pays the liabilities, and the statement is misleading since the majority below did rule that the company can be held directly liable and, further, the majority precluded the trial court from finding the union co-defendants directly and solely responsible for all the liabilities resulting from their refusal to accept the October 31, 1968 offer to dovetail.

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tives" is to compensate the injured claimants. The other is a prophylactic or deterrent objective—to encourage voluntary compliance. As the Court stated in *Albemarle*, "the primary objective [of Title VII] was a prophylactic one," directly pertinent to backpay:

> "It is the reasonably certain prospect of a backpay award that 'provide[s] the spur or catalyst which causes employers *and unions*[6] to self-examine and self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.' *United States* v. *N.L. Industries*, 479 F.2d 354, 379 (CA8 1973)." (*Id.* at 417-418).

Where there are two or more defendants, the "make-whole" objective of Title VII may generally be accomplished by any division, allocation or assignment of the backpay liability which assures the availability of money to satisfy awards. However, in so dividing, allocating or assigning responsibility for backpay liabilities a court must honor the prophylactic objective of Title VII and also avoid conflict with important duties under provisions of other federal statutes.

In the present case, the Court of Appeals focused on the compensation objective, and considered the deterrent objective solely as providing "an economic incentive for *an employer* to obviate discrimination voluntarily . . ." (A. 8).[7] Thus the majority failed to apply the deterrent objective to the co-defendant unions that never offered to dovetail the separate rosters, that had in 1968 received and declined

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[6] Italics in this petition are ours unless indicated otherwise.

[7] Except for that single reference to the deterrent objective, the majority throughout its opinion directly and indirectly proceeded on the assumption that: "*The objective* of an award of backpay is 'to make persons whole for injuries suffered on account of unlawful employment discrimination'." (A. 6)

an offer to do so, and that even today continue to litigate every possible issue concerning the dovetailing.

The ruling below actually encourages a union to resist a company's efforts to eliminate discrimination. For, in a case such as this, the company has paid the same wage rates to everyone and did not profit from the maintenance of separate seniority rosters for the adjacent yards. But a union, by resisting the remedy, preserves for some of its members advantages that might otherwise have been reduced and yet offers to other members claims for backpay against the employer. Such a result perverts the deterrent objective of Title VII.

The backpay ruling, moreover, does far more than defeat a fundamental objective of Title VII:

(1) By foreclosing the trial court from concluding that the UTU could be held solely and directly liable for backpay arising from its actions, the Court of Appeals defeated the long-established purpose of the duty of fair representation imposed on the UTU under the Railway Labor Act. Neither the statutory duty nor the problem here is a new one. As Mr. Justice Black observed, speaking for the unanimous Court almost twenty years ago:

> "Once again Negro employees are here under the Railway Labor Act asking that their collective bargaining agent be compelled to represent them fairly. In a series of cases beginning with *Steele* v. *Louisville & Nashville R. Co.*, 323 U.S. 192, this Court has emphatically and repeatedly ruled that an exclusive bargaining agent under the Railway Labor Act is obligated to represent all employees in the bargaining unit fairly and without discrimination because of race . . . ." (*Conley* v. *Gibson*, 355 U.S. 41, 42 (1957))

The union's duty is an affirmative, continuing one "which does not end with the making of an agreement" (*id.* at 46) and which, in the present case, applies to the UTU as the

exclusive statutory bargaining agent for all the relevant employees, black and white, in both yards. Although Title VII is fully consistent with that fair representation duty,[8] the backpay ruling of the court below unnecessarily and erroneously failed to integrate or accommodate the purposes of Title VII with those of the Railway Labor Act.

The majority below, as aptly stated by the dissent, predicated its backpay ruling "entirely on the failure of the railroad to dovetail . . ." (A. 17). To the majority, it was sufficient and thereby controlling that "Even if N & W did offer to dovetail seniority rosters in 1968, the fact is that dovetailing was not accomplished" (A. 4). That approach led to the imposition of an across-the-board liability on the employer and ignored both the employer's *and* the union's duties under the Railway Labor Act.

First, as the dissent states (A. 23), the court's action assumed that the N & W could *unilaterally* have dovetailed the seniority rosters. However, the N & W is prohibited by the Railway Labor Act from making unilateral changes in a union agreement. Criminal sanctions preclude such unilateral action (45 U.S.C. §152). Second, in limiting the type of liability exposure for the unions, the court effectively exonerated the UTU from violating its affirmative duty under the Railway Labor Act to represent all employees fairly. This undermining of the affirmative duty of fair representation is clearly unjustifiable here since the employer unconditionally offered to do what the union should have been demanding.

The unions' insistence that the integrating of seniority rosters was "an internal matter" for the UTU (R. 940a) to resolve is an admission of the UTU's responsibility here. Despite the UTU's position that the resolution of the conflicting, provincial, vested interests of the separate locals was "an internal matter," and notwithstanding its duty of fair representation, the UTU would now be exonerated

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[8] See the provisions of Title VII set forth at p. 4 above and of the Railway Labor Act at p. 5 above.

from any sole and direct liability comparable to that imposed on the employer. At the same time, the employer, who unconditionally offered the dovetailing prior to its being required by the Court of Appeals, is now made liable.

(2) The backpay ruling conflicts with decisions of the Court of Appeals for the Fifth Circuit that have divided, allocated or assigned backpay liability among co-defendant unions and employers for maintaining separate seniority systems. The conflict stems in part from the erroneous attempt of the court below to apply the recently decided *Albemarle* case to an issue not raised or involved in that decision.[9] It is one thing to rule, as this Court did in *Albemarle*, that good faith "is not a sufficient reason for *denying* backpay" (422 U.S. at 422). But, it is far different to rule that the employer, and not the co-defendant unions, can be held directly liable for backpay arising from the unions' rejection of a good-faith offer on a matter they insisted was their "internal" responsibility. Yet, that is what the majority did here:

> "As we have said, irrespective of any good faith effort on the part of N & W to obviate the discriminatory effect of separate seniority lists in 1968, the fact is that the discrimination was not obviated; under *Albemarle Paper Co.*, N & W's good faith efforts cannot insulate it from plaintiffs' claims." (A. 7)

Thus the court below misapplied *Albemarle* and ignored Section 2000e-5(g) of Title VII which specifies that any backpay award is to be:

> "*payable by* the employer, employment agency, *or* labor organization, *as the case may be, responsible for* the unlawful employment practice."

The Court of Appeals for the Fifth Circuit, in Title VII cases challenging seniority systems where unions and

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[9] *Albemarle* was decided after the present case had been briefed and argued but before the Court of Appeals' September 22, 1975 opinion.

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employers have been co-defendants, has sustained rulings which deemed the good faith actions of a co-defendant-employer not only relevant but also sufficient to impose on the co-defendant unions sole and direct liability for all, or for a separate identifiable portion, of the backpay liability. In *Guerra* v. *Manchester Terminal Corp.*, 498 F.2d 641 (5th Cir. 1974), the court held that the good-faith actions of the defendant-employer, as contrasted with the actions of the union, were relevant:

> "once a court passes the finger-pointing stage and begins to decide who bears the dollars and cents responsibility for righting the wrong." (*Id.* at 656)

Further, in sustaining the district court's order requiring unions to indemnify the employer for all of the backpay liability, the Fifth Circuit explained that:

> "We do not mean to intimate that all of the dirt in this case is to be found on union hands. The district court certainly did not think so, and we agree that the employer, too, violated the statute. Nor do we mean to suggest that employers can avoid paying for their civil rights violations by standing passively by as unions take the active role. We say only that because the undisputed facts of this case identify the unions, particularly the Local, as those *principally responsible* for plaintiff's loss of the Dock job, the district judge did not abuse his discretion in placing final responsibility for the monetary recovery at the feet of [union-] appellants." (*Ibid.*)

This ruling applies *a fortiori* here where the employer was not responsible at all for the failure of the unions to dovetail rosters.

Another Fifth Circuit ruling conflicting with the present case is *Stevenson* v. *International Paper Co.*, 516 F.2d 103 (1975), decided after *Albemarle*. In *Stevenson*, the plaintiffs attacked certain steps taken by the company and the unions

to merge previously segregated lines of job progression. The Court of Appeals recognized that two of the practices for which backpay was sought had been "spawned" by the unions' "disagreement with [company] policy" (516 F.2d at 113, 108). The court concluded that on remand the district court should "consider the extent to which the unions . . . might be held separately liable for back pay" for losses caused by those practices and the possibility that the employer "might be liable for back pay only to those [members of the affected class] who were impeded by the [other] inadequacies" (*id.* at 113-114). If the same equitable principles had been applied in the present case, the court would then have directed the trial court to consider various divisions of backpay liability including, among others, whether either or both of the co-defendant unions should bear direct and separate responsibility for the backpay liability arising because of their failure or refusal to dovetail in 1968.

Guerra and *Stevenson* clearly established that, even though both the employer and unions have been parties to an agreement that violated Title VII, consideration should be given in determining the imposition of liability for backpay to good faith actions and relative fault. Unions may be and have been held directly responsible for paying all of the liability stemming from resisting or obstructing an employer's offer to eliminate or mitigate the effects of past discrimination. Other decisions applying equitable principles have indicated that an equal sharing of backpay liability between a company and a union is appropriate where the findings show that "all parties seem to be equally guilty—or guiltless" (*e.g.*, *Carey* v. *Greyhound Bus Co., Inc.*, 500 F.2d 1372, 1379 (5th Cir. 1974)).[10]

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[10] See also *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974); *Bush* v. *Lone Star Steel Co.*, 373 F. Supp. 526 (E.D. Tex. 1974) (backpay award divided ⅓ union, ⅓ local, ⅓ company as to earlier period of time; ½ local, ½ company as to period of time when statute of limitations exempted the union).

Here, however, the majority of the Court of Appeals ignored the unions' duties and conduct in arbitrarily restricting their maximum potential liability to a "partial indemnification."

Resolution by this Court of the conflict that the Fourth Circuit decision creates between the circuits is necessary if this Court's objective of having "a consistent and principled application of the backpay provision" is to be attained in those recurrent situations, not addressed in *Albemarle*, in which a court must determine the respective liabilities of employers and unions as co-defendants (422 U.S. at 421).

(3) This Court noted in *Albemarle* that:

> "some courts have denied backpay, and limited their judgments to declaratory relief, in cases where the employer discriminated on sexual grounds in reliance on state 'female protective' statutes that were inconsistent with Title VII. See, *e.g.*, *Kober* v. *Westinghouse Electric Corp.*, 480 F.2d 240 (CA3 1973); *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, 460 F.2d 1228 (CA5 1972); *Manning* v. *General Motors Corp.*, 466 F.2d 812 (CA6 1972); *Rosenfeld* v. *Southern Pacific Co.*, 444 F.2d 1219 (CA9 1971). There is no occasion in this case to decide whether these decisions were correct." (422 U.S. at 423 fn. 18)

The present decision conflicts with even the most limited application of the principles sustained in those cases involving state "female protective" statutes. As the dissenting judge stated in this case:

> "Why an employer may be exempted from liability under some circumstances by complying with a state law and condemned to liability for complying with a federal law is an inconsistency I do not think acceptable, and no reason exists to fashion such a distinction." (A. 23-24)

The Railway Labor Act has long required and conditioned employers to negotiate expeditiously and in good faith with unions on matters of working conditions and to eschew unilateral action. *Chicago and Northwestern Railway Co.* v. *United Transportation Union*, 402 U.S. 570 (1970); *Detroit & Toledo Shore Line Railroad Co.* v. *United Transportation Union*, 396 U.S. 142 (1969). Since the UTU refused to cooperate in dovetailing the seniority rosters, the N & W was no less trapped between conflicting duties under different federal statutes than were those employers who honored the terms of state female protective statutes. Indeed, the only reason the N & W was caught between the Scylla of the labor laws and the Charybdis of Title VII was because the UTU failed in its affirmative duty of fair representation under the Railway Labor Act.

Moreover, application of the conflicting-obligations principles recognized in cases involving state female protective statutes would not, in this case, defeat the objective of providing compensation to the injured claimants, since here the co-defendant unions can be held directly and solely liable for all the results of their actions.

(4) The court below failed to consider, and therefore rejected, the important principle that the UTU was the sole statutory bargaining agent for the plaintiffs and that the UTU and its member-plaintiffs are, as against the N & W, bound by the admitted knowledge of the UTU representative. The majority violated that principle by proceeding from its assertion that "the record does not support the district court's suggestion that plaintiffs knew of the merger offer in 1968" (A. 4) to the conclusion that the N & W has "no defense" against, and cannot "escape," liability to the plaintiffs (A. 4, 7). On any view of the facts, the UTU not only knew of, but received in writing, the N & W's unconditional offer to dovetail the seniority rosters. As the dissenting opinion indicates, upon a disagreement with the district

court's finding that the named claimants actually knew of the offer to dovetail, it was necessary to:

> "reach the valid legal proposition that they [the individual union claimants] are nevertheless bound by the knowledge of their representatives *in a contest with the railroad.* In a contest with the union, of course, they would not necessarily be bound." (A. 22 fn. 3).

Holding, as the majority did, that the N & W is somehow responsible for the union members' alleged lack of knowledge shifts onto the employer the duty of communicating directly with the union membership on issues where the employer cannot reach an agreement with the statutory bargaining agent. That duty properly rested only on the UTU. *Virginian Railway Co.* v. *System Federation No. 40,* 300 U.S. 515 (1937). As the dissenting judge observed, any lack of knowledge among union members was "bound to be based on their international and local officials not imparting knowledge of the offer to them" (A. 20 fn. 2).

Finally, as the dissent also notes, "it is nothing less than an injustice to mulch it [the railroad] for damages based on any lack of knowledge of the 1968 offer on the part of the class plaintiffs" when "the railroad in fact made a bona fide offer to do, in 1968, the same thing we now command it to do in 1975 . . ." (A. 20 fn. 2).

(5) The court below misconstrued the backpay provision of Title VII as requiring only that liability be placed upon a financially solvent co-defendant and tacitly assumed, without foundation, that neither co-defendant union was financially capable of satisfying the backpay liability (A. 8). Section 2000e-5(g) of Title VII provides that any backpay award is to be "*payable by* the employer, employment agency, or labor organization, *as the case may be, responsible for* the unlawful employment practice." Those terms require a factual inquiry into what discriminatory consequences are attributable to the actions of each respective

co-defendant. Here, however, the section has been subverted by the imposition of strict liability oblivious of relative fault and predicated on an assumed ability to pay. Significantly, no attempt was made by the majority below to suggest that a large international union such as the UTU would be unable to satisfy the backpay liability. The dissent properly rejected "the reasoning of the majority that an award should be made against any party in any lawsuit because it is financially solvent. This is a kind of Robin Hood justice which I do not and may not subscribe to" (A. 24).

(6) A majority of the court below unjustifiably rejected certain specific findings of fact. In doing so, the majority neither mentioned nor honored this Court's injunction in *Albemarle* that, in measuring backpay rulings against the purposes of Title VII, the courts of appeals must "recogniz[e] that the trial court will often have the keener appreciation of those facts and circumstances peculiar to the" case (422 U.S. at 421-422). The dissent properly concluded that the majority's actions were "a flagrant disregard of FRCP 52(a), not to mention the recent express command of the Supreme Court in *Albemarle Paper Company*" (A. 22).

The court below accepted the fact that in 1968 the N & W made a bona fide and unconditional offer to dovetail seniority rosters. However, the trial court had also specifically found that the offer "was turned down by the Unions" (A. 32). The majority below attempted to transform that finding by the district court into an abandonment of the offer by the employer (A. 7 fn. 1a). The record is replete with evidence justifying the district court's conclusion that the unions "turned down" the offer in furtherance of their own multiple provincial interests (A. 19, 22; see also pp. 7-9 above).

The district court also had found that the offer to dovetail was known by the representatives of the plaintiff class, most of whom were local union officials (A. 32). The majority below, however, preferred to accept testimony from class representatives indicating that they had neither

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seen nor heard of the offer. The dissenting judge found it "beyond comprehension" that the majority should reject perfectly well supported findings of fact made by the district court and accept "inherently incredible" testimony:

> "[e]specially in view of the fact that a copy of the October 31, 1968 proposal of dovetailing was filed with a motion to dismiss on July 21, 1969, and necessarily known to the plaintiffs' attorneys in this case and also to the plaintiffs . . . ." (A. 21)[11]

In reversing the trial court's findings with respect to the knowledge of the plaintiffs and by ignoring the unions' past and continuing resistance to dovetailing, the court below laid a basis for its footnote argument that the N & W should have made a "more assiduous effort" to merge rosters (A. 7 fn. 1a) and therefore that the N & W — but not the unions that made no effort — could be held directly liable for backpay. That conclusion rejected the duty of fair representation imposed upon the unions and failed to apply established equitable principles as between the unions and the company.

Finally, the district court refused to consider the 1964 Nickel Plate merger minimum wage agreement because it was raised for the first time in closing argument after the second trial. By overruling the district court, the Court of Appeals failed to consider whether the terms and conditions of that agreement were within the province of the Interstate Commerce Commission which had approved that agreement as "a fair and equitable arrangement to protect the interests of [affected] railroad employees" under 49 U.S.C. §5(2)(f) (*Norfolk & Western R. Co.* v. *Nemitz*, 404

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[11] Other relevant facts are referred to in the dissent at A. 20-22. In addition, as indicated above (p. 7 fn. 3), the black local had conducted a referendum in April of 1968 on the question of a merger of rosters. Officials sufficiently concerned with merger to conduct a referendum cannot lightly be presumed to be unaware of a company offer on the same subject.

U.S. 37 (1971)). Furthermore, not having a copy of the document in the record, the Court of Appeals erroneously assumed that the agreement did not "extend" to the employees in the Barney Yard (A. 3, 12, 13).

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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